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PICTURES CORPORATION, SONY
PICTURES ENTERTAINMENT INC.,
and VIACOM INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

DAVID L. WHITEHEAD,

Plaintiff,

v.

MILLENNIUM FILMS; VERIZON
INC.; PARAMOUNT PICTURES;
VIACOM; 20TH CENTURY FOX
FILM; OPRAH WINFREY; TOM
CRUISE; PAULA WAGNER; DAN
SNYDER; JP MORGAN; COMCAST
INC.; SONY; MOONBOT STUDIOS;
CHIPOTLE MEXICAN GRILL;
APPLE INC.; SHEILA C. JOHNSON;
HARVEY WEINSTEIN; THE
WEINSTEIN COMPANY; COLONEL
J. GEORGE & S. SALOOM HANNIE
COMMUNITY HOME, INC. and
UNKNOWN OFFICERS;
SOCKRIDER, BOLIN, ANGLIN &
BATTE PLC; and UNKNOWN DOES
1-50,

Defendants.

Case No. 15-CV-3564 RGK (AGRx)

**DEFENDANTS PARAMOUNT
PICTURES CORPORATION, SONY
PICTURES ENTERTAINMENT
INC., AND VIACOM INC.'S
NOTICE OF MOTION AND
MOTION FOR JUDGMENT ON
THE PLEADINGS AS TO
PLAINTIFF DAVID L.
WHITEHEAD'S CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**[Declaration of Cameron J. Johnson;
[Proposed] Order; Request for
Judicial Notice; Declaration of
Cameron J. Johnson ISO RJN; and
[Proposed] Order Granting RJN filed
concurrently herewith]**

**Date: May 2, 2016
Time: 9:00 a.m.
Crtrm.: 850**

The Honorable R. Gary Klausner

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 2, 2016, at 9:00 a.m., or as soon
3 thereafter as this matter may be heard, in the courtroom of the Honorable R. Gary
4 Klausner, located in Courtroom 850 of the United States Courthouse located at the
5 Edward R. Roybal Federal Building, 255 East Temple Street, Los Angeles, CA
6 90012, Defendants Paramount Pictures Corporation, Sony Pictures Entertainment
7 Inc., and Viacom Inc. (collectively, “Defendants”) will and hereby do move this
8 Court to enter judgment on the pleadings in favor of Defendants on each of the
9 claims Plaintiff David L. Whitehead (“Plaintiff”) asserts in his Complaint
10 (“Compl.”), ECF No. 6, and dismiss this action with prejudice.

11 This Motion is made upon the following grounds:

12 *First*, Plaintiff claims that Defendants’ films *The Butler* and *Selma* infringe
13 Plaintiff’s work *The Rise Fall & Rise of a Mayor* (“*The Mayor*”), as set forth in
14 Plaintiff’s fifth cause of action, *see* Compl., ¶¶ 100-03, fail as a matter of law
15 because neither *The Butler* nor *Selma* is substantially similar in protectable
16 expression to *The Rise Fall & Rise of a Mayor*.

17 *Second*, Plaintiff’s first, second and third causes of action for violation of the
18 Racketeer Influenced and Corrupt Organizations Act (“RICO”), *see id.*, ¶¶ 46-98, fail
19 as a matter of law because only *criminal* copyright infringement qualifies as a
20 predicate act under RICO and Plaintiff purports to allege, at most, *civil* copyright
21 infringement. These claims also fail because the copyright infringement on which
22 Plaintiff relies fails as a matter of law and because Plaintiff fails to sufficiently allege
23 the existence of a *pattern* of racketeering activity, an enterprise, or damages arising
24 from the alleged misconduct.

25 *Third*, Plaintiff’s fourth cause of action and tenth cause of action for fraud, *see*
26 *id.*, ¶¶ 99, 111, fail because Plaintiff has failed to allege any of the essential elements
27 of a fraud claim and because Plaintiff’s fraud claims are preempted by the Copyright
28 Act.

1 *Fourth*, Plaintiff's sixth cause of action for conspiracy, *see id.*, ¶ 104, fails
2 because Plaintiff fails to allege any of the necessary elements.

3 *Fifth*, Plaintiff's seventh cause of action for false designation of origin in
4 violation of the federal Lanham Act, *see id.*, ¶ 107, fails as a matter of law because a
5 false designation of origin claim under the Lanham Act may not be based on the
6 failure to properly attribute the authorship of an idea, concept, or communication,
7 which instead arises under the Copyright Act.

8 *Sixth*, Plaintiff's eighth cause of action for breach of implied contract based on
9 race, *see id.*, ¶¶ 108-09, and thirteenth cause of action for race discrimination, *see id.*,
10 ¶ 114, fail because Plaintiff fails to allege any facts showing he was discriminated
11 against based on race. Plaintiff's eighth cause of action fails for the additional reason
12 that Plaintiff has not pled facts showing the existence of an agreement, implied or
13 otherwise, and Plaintiff's thirteenth cause of action fails for the additional reason that
14 Plaintiff has not alleged facts showing Defendants acted under color of state law.

15 *Seventh*, Plaintiff's ninth cause of action for negligence, *see id.*, ¶ 110, fails
16 because Plaintiff has not alleged any of the essential elements and Plaintiff's claim is
17 preempted by the Copyright Act to the extent Plaintiff contends the duty Defendants
18 violated was their duty to protect him from copyright infringement.

19 *Eighth*, Plaintiff's eleventh cause of action for malicious and tortious
20 interference of potential contracts, *see id.*, ¶ 112, fails because Plaintiff has not
21 alleged any of the necessary elements.

22 *Ninth*, Plaintiff's twelfth cause of action for privacy violations, *see id.*, ¶ 113,
23 fails because Plaintiff has not alleged any of the essential elements and Plaintiff's
24 claim is preempted by the Copyright Act.

25 *Tenth*, Plaintiff's fourteenth cause of action for unfair competition, *see id.*,
26 ¶ 115, and fifteenth cause of action for unfair competition and copyright
27 infringement under California law, *see id.*, ¶¶ 116-17, fail because they are
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1 preempted by the Copyright Act and because Plaintiff has not alleged any of the
2 necessary facts.

3 *Eleventh*, Plaintiff's sixteenth cause of action for conversion, *see id.*, ¶ 118,
4 fails because Plaintiff has not alleged any of the essential elements and because it is
5 preempted by the Copyright Act.

6 *Twelfth*, Plaintiff's seventeenth cause of action for vicarious infringement, *see*
7 *id.*, ¶ 119, fails because Plaintiff fails to allege *The Mayor* was infringed and thus
8 cannot state a claim for vicarious infringement.

9 *Thirteenth*, Plaintiff's eighteenth cause of action, which simply seeks
10 "damages," *id.*, ¶ 120, fails because each of Plaintiff's substantive claims fail.

11 This Motion is based on this Notice of Motion, the accompanying
12 Memorandum of Points and Authorities, the concurrently filed Declaration of
13 Cameron J. Johnson in Support of the Motion, the concurrently filed Request for
14 Judicial Notice, the concurrently filed Declaration of Cameron J. Johnson in Support
15 of the Request for Judicial Notice and the attached exhibits, all of the pleadings and
16 other documents on file in this case, all other matters of which the Court may take
17 judicial notice, and any further argument or evidence that may be received by the
18 Court at the hearing.

19 Pursuant to Local Rule 7-3, counsel for Defendant discussed the issues
20 presented in this Motion by telephone with Plaintiff on February 8, 2016, but were
21 unable to resolve them. *See* Declaration of Cameron J. Johnson, ¶ 2.

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1 DATED: March 30, 2016

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4 By /s/ Linda M. Burrow

5 LINDA M. BURROW

6 Attorneys for Defendants PARAMOUNT
7 PICTURES CORPORATION, SONY
8 PICTURES ENTERTAINMENT INC., and
9 VIACOM INC.

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25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND.....	1
A. Plaintiff’s Long History as a Vexatious Litigant.....	1
B. Plaintiff’s Allegations in the Instant Action	2
1. <i>The Rise Fall & Rise of a Mayor</i>	3
2. <i>Lee Daniels’ The Butler</i>	4
3. <i>Selma</i>	5
III. THIS COURT SHOULD GRANT DEFENDANTS’ MOTION.....	6
A. Plaintiff’s Complaint Should Be Dismissed in Light of Plaintiff’s Violation of Numerous Vexatious Litigant Orders	7
B. Each of Plaintiff’s Causes of Action Should Be Dismissed for Failure to State a Claim.....	7
1. Plaintiff Fails to State a Claim for Copyright Infringement.....	8
(a) Plaintiff Fails to Allege Access.....	8
(b) The Works Are Not Substantially Similar	9
(i) <i>The Mayor</i> Is Not Similar to <i>The Butler</i>	9
(ii) <i>The Mayor</i> Is Not Similar to <i>Selma</i>	12
2. Plaintiff’s Remaining Claims Also Fail as a Matter of Law	14
(a) Plaintiff’s RICO Claims Fail.....	14
(b) Plaintiff’s Fraud Claims Fail	15
(i) Plaintiff’s Fails to State a Claim for Fraud	15
(ii) Plaintiff’s Fraud Claims Are Preempted.....	16
(c) Plaintiff’s Conspiracy Claim Fails	17
(d) Plaintiff’s Lanham Act Claim Fails	17
(e) Plaintiff’s Racial Discrimination Claims Fail	18
(f) Plaintiff’s Negligence Claim Fails	18
(g) Plaintiff’s Tortious Interference Claim Fails	18
(h) Plaintiff’s Privacy Violation Claim Fails	19
(i) Plaintiff’s Unfair Competition Claims Fail.....	19

1	(j) Plaintiff's Conversion Claim Fails.....	19
2	(k) Plaintiff's Vicarious Infringement Fails.....	20
3	(l) Plaintiff's Damages Claim Fails	20
4	IV. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE	20
5	V. CONCLUSION	20

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Art Attacks Ink, LLC v. MGA Entm't Inc.,</i> 581 F.3d 1138, 1143 (9th Cir. 2009)	8
<i>Benay v. Warner Bros. Ent.,</i> 607 F.3d 620 (9th Cir. 2010)	<i>Passim</i>
<i>Ashcroft v. Iqbal,</i> 556 U.S. 662 (2009)	6, 8
<i>Campbell v. Walt Disney Co.,</i> 718 F. Supp. 2d 1108 (N.D. Cal. 2010).....	7, 20
<i>Cavalier v. Random House, Inc.,</i> 297 F.3d 815 (9th Cir. 2002)	9, 10, 13
<i>Caviness v. Horizon Cmty. Learning Ctr., Inc.,</i> 590 F.3d 806 (9th Cir. 2010)	18
<i>Chavez v. United States,</i> 683 F.3d 1102 (9th Cir. 2012).....	6
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.,</i> 539 U.S. 23 (2003)	17
<i>Del Madera Properties v. Rhodes & Gardner, Inc.,</i> 820 F.2d 973 (9th Cir. 1987)	19
<i>Design Art, Inc.,</i> No. 00CV593 JM (JAH), 2000 WL 33151646 (S.D. Cal. Aug. 18, 2000)	16, 17
<i>Dielsi v. Falk,</i> 916 F. Supp. 985 (C.D. Cal. 1996).....	20
<i>Feldman v. Twentieth Century Fox Film Corp.,</i> 723 F. Supp. 2d 357 (D. Mass. 2010).....	8
<i>Fogerty v. Fantasy, Inc.,</i> 510 U.S. 517 (1994)	19

1	<i>Funky Films, Inc. v. Time Warner Entm't Co., L.P.</i> ,	
2	462 F.3d 1072 (9th Cir. 2006)	9, 11, 13
3	<i>Gadh v. Spiegel</i> ,	
4	No. CV 14-855-JFW PJWX,	
5	2014 WL 1778950 (C.D. Cal. Apr. 2, 2014)	20
6	<i>Giddings v. Vison House Prod., Inc.</i> ,	
7	No. CV05-2963-PHX-MHM,	
8	2007 WL 2274800 (D. Ariz. Aug. 7, 2007)	17
9	<i>Gillespie v. Civiletti</i> ,	
10	629 F.2d 637 (9th Cir. 1980)	17
11	<i>In re Fillbach</i> ,	
12	223 F.3d 1089 (9th Cir. 2000)	7
13	<i>Jalili v. Far E. Nat. Bank</i> ,	
14	No. C 12-5962 SBA,	
15	2013 WL 1832648, at *3 (N.D. Cal. May 1, 2013)	14, 15
16	<i>Kearns v. Ford Motor Co.</i> ,	
17	567 F.3d 1120 (9th Cir. 2009)	15
18	<i>Kersh v. Cook</i> ,	
19	332 F. App'x 420 (9th Cir. 2009)	7
20	<i>Knappenberger v. City of Phoenix</i> ,	
21	566 F.3d 936 (9th Cir. 2009)	20
22	<i>Kouf v. Walt Disney Pictures & Television</i> ,	
23	16 F.3d 1042 (9th Cir. 1994)	9
24	<i>Laws v. Sony Music Entm't, Inc.</i> ,	
25	448 F.3d 1134 (9th Cir. 2006)	16, 19
26	<i>Living Designs, Inc. v. E.I. Dupont de Nemours & Co.</i> ,	
27	431 F.3d 353 (9th Cir. 2005)	14
28	<i>MDY Indus., LLC v. Blizzard Entm't, Inc.</i> ,	
	629 F.3d 928 (9th Cir. 2010)	20
	<i>McIntyre v. Colonies-Pac., LLC</i> ,	
	228 Cal. App. 4th 664 (2014)	18

1	<i>Mention v. Gessell,</i>	
2	714 F.2d 87 (9th Cir. 1983)	19
3	<i>Mintel Learning Tech., Inc. v. Beijing Kaidi Educ.,</i>	
4	No. C 06 7541 PJH,	
5	2007 WL 2288329 (N.D. Cal. Aug. 9, 2007)	17
6	<i>Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers,</i>	
7	795 F.3d 1124, 1133 (9th Cir. 2015)	18
8	<i>Newsom v. Countrywide Home Loans, Inc.,</i>	
9	714 F. Supp. 2d 1000 (N.D. Cal. 2010)	6
10	<i>Olson v. National Broad. Co., Inc.,</i>	
11	855 F.2d 1446 (9th Cir. 1988)	10, 12
12	<i>Robert Kubicek Architects & Associates Inc. v. Bosley,</i>	
13	No. CV 11-2112 PHX DGC,	
14	2012 WL 3149348 (D. Ariz. Aug. 1, 2012)	14
15	<i>Schloss v. Sick Optic Elec., Inc.,</i>	
16	No. CIV. 96-20236 SW,	
17	1996 WL 708374 (N.D. Cal. Nov. 22, 1996)	18
18	<i>Shame on You Prods., Inc. v. Banks,</i>	
19	120 F. Supp. 3d 1123 (C.D. Cal 2015)	7, 15
20	<i>Stewart v. Wachowski,</i>	
21	No. CV 03-2873 MMM VBKX,	
22	2005 WL 6184235 (C.D. Cal. June 14, 2005)	14
23	<i>Swartz v. KPMG LLP,</i>	
24	476 F.3d 756 (9th Cir. 2007)	16
25	<i>Sybersound Records, Inc. v. UAV Corp.,</i>	
26	517 F.3d 1137 (9th Cir. 2008)	16, 19
27	<i>Three Boys Music Corp. v. Bolton,</i>	
28	212 F.3d 477 (9th Cir. 2000)	8
	<i>UMG Recordings, Inc. v. Augusto,</i>	
	628 F.3d 1175 (9th Cir. 2011)	8

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2	655 F.3d 984 (9th Cir. 2011)	7
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4	317 F.3d 1097 (9th Cir. 2003)	15
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6	784 F.2d 44 (2d Cir. 1986)	10, 11, 12
7	<i>Watermark Publishers v. High Tech. Sys. Inc.,</i>	
8	1997 WL 717677 (S.D. Cal. Aug. 12, 1997).....	18
9	<i>Whitehead v. Paramount Pictures Corp.</i>	
10	145 F. Supp. 2d 3 (D.D.C. 2001).....	1, 2, 7
11	<i>Whitehead v. Viacom,</i>	
12	233 F. Supp. 2d 715 (D. Md. 2002.....	2, 7
13	<i>Whitehead v. Wickham,</i>	
14	No. 05-CA-3346,	
15	2005 WL 2874975 (D.C. Super. Ct. Sept. 6, 2005)	2, 7
16	<i>Williams v. UMG Recordings, Inc.,</i>	
17	281 F. Supp. 2d 1177 (C.D. Cal. 2003).....	17
18	<i>Zella v. E.W. Scripps Co.,</i>	
19	529 F. Supp. 2d 1124 (C.D. Cal. 2007).....	9
20	<u>Statutes and Rules</u>	
21	17 U.S.C. § 501(a)	8
22	37 C.F.R. § 202.1	13
23	Fed. R. Civ. Proc. 9(b)	15
24	Fed. R. Civ. P. 12(c)	6
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff David L. Whitehead, who has filed dozens of frivolous lawsuits
4 around the country, claims that Defendants Paramount Pictures Corporation
5 (“Paramount”), Sony Pictures Entertainment Inc. (“SPE”), and Viacom Inc.
6 (“Viacom”) (collectively, “Defendants”) somehow infringed his copyrighted work
7 *The Rise Fall & Rise of a Mayor* (“*The Mayor*”) through their alleged involvement in
8 the films *Lee Daniel’s The Butler* and *Selma*. Plaintiff’s claim is meritless, as there
9 is no substantial similarity of protectable expression between *The Mayor* and *Selma*
10 or *The Butler*. Plaintiff’s remaining seventeen claims, each of which depends on this
11 alleged infringement, also fail as Plaintiff fails to allege *any* of the essential elements
12 of those claims, and many are preempted by the Copyright Act.

13 This case is yet another in a long line of cases, asserting “opaque, nonsensical
14 and frivolous” claims Plaintiff has filed. Request for Judicial Notice (“RJN”), Ex. A
15 (*Whitehead v. Columbia Pictures*, 98-CV-2938, ECF No. 96 at 5 (D.D.C. 2001)).
16 Enough is enough. This Court should grant Defendants’ motion, declare Plaintiff a
17 vexatious litigant pursuant to Local Rule 83-8, and issue an award of attorneys’ fees.

18 **II. BACKGROUND**

19 **A. Plaintiff’s Long History as a Vexatious Litigant**

20 For more than twenty years, Plaintiff has filed numerous cases in which he
21 accuses dozens of defendants of copyright infringement. *See, e.g., Whitehead v.*
22 *Paramount Pictures Corp.* 145 F. Supp. 2d 3, 4 (D.D.C. 2001) (describing Plaintiff’s
23 history as a vexatious litigant).¹ To Defendants’ knowledge, “[e]very one of Mr.
24 Whitehead’s suits has been dismissed or resolved in defendants’ favor.” *Id.*
25 Plaintiff’s abuses of the judicial system, have led at least five courts to declare him a

26 ¹ A PACER search reveals that Plaintiff has filed approximately fifty-eight federal
27 cases, six of which were filed in the Central District of California. Declaration of
28 Cameron J. Johnson (“Johnson Decl.”), ¶ 3.

1 vexatious litigant and issue orders prohibiting Plaintiff from commencing new
2 actions without first obtaining leave of court.²

3 ***B. Plaintiff's Allegations in the Instant Action***

4 In the instant action, Plaintiff claims that Defendants³ “conspir[ed] to
5 massively infringe and steal” *The Mayor* and *Michael Jackson and the Ghost of Ben*
6 (“*Ben*”), through their involvement in the feature films *Lee Daniels’ The Butler* and
7 *Selma*⁴, and a commercial for former defendant Chipotle Mexican Grill entitled *The*
8 *Scarecrow*. ECF No. 6 (“Compl.”), ¶¶ 14-15, 26, 99.⁵ Plaintiff appears to allege
9 that: (1) *Selma* and *The Butler* infringe *The Mayor*, and (2) *The Scarecrow* infringes
10 *Ben*. See, e.g., Compl., ¶ 15, ECF No. 6, ¶ 26, ECF No. 105 at 14-15, ¶¶ 14, 18.
11 Plaintiff does not allege that Paramount, SPE, or Viacom had any involvement in *The*
12 *Scarecrow*. See Compl., ¶ 26 (alleging that Moonbot Studios, Chipotle, and Apple
13 were responsible for the commercial); ECF No. 105 at 4. Accordingly, Defendants
14 do not address *The Scarecrow* or *Ben* below.⁶

15 _____
16 ² See RJN, Ex. B (*Whitehead v. White & Case, LLP*, Civil Action No. 12-cv-0399,
17 ECF No. 45 at 1 (W.D. La., May 16, 2012)); *id.*, Ex. C (*Whitehead v. Friedman*, No.
18 02-1630 (RWR), ECF No. 48 at 1 (D.D.C. Sept. 8, 2003)); *Whitehead v. Paramount*
19 *Pictures Corp.*, No. 1:08CV792, 2009 WL 1491402, at *4 (E.D. Va. May 26, 2009);
20 *Whitehead v. Wickham*, No. 05-CA-3346, 2005 WL 2874975, at *5 (D.C. Super. Ct.
21 Sept. 6, 2005); *Whitehead v. Viacom*, 233 F. Supp. 2d 715, 727 (D. Md. 2002).

22 ³ Plaintiff initially named a total of eighteen defendants, all of whom except for
23 Paramount, SPE, and Viacom have been dismissed. See ECF No. 84.

24 ⁴ Paramount caused the film *Selma* to be exhibited in theaters. ECF No. 79, ¶ 103.
25 Defendants do not otherwise admit involvement in *Selma* or *The Butler*.

26 ⁵ On January 25, 2016, Plaintiff filed a motion for leave to amend his original
27 Complaint. ECF No. 105 at 4. The Court granted the motion in part and denied the
28 motion in part, including denying Plaintiff’s request to add claims based on *This Is It*.
ECF No. 128; ECF No. 105 at 4. The Court ordered Plaintiff to lodge his proposed
FAC with the Court for approval. ECF No. 128. Plaintiff has not yet lodged a new
[Proposed] FAC. However, given the scope of the permitted amendments, the claims
in the FAC should not be materially different from those in the Complaint.

⁶ The original Complaint and Plaintiff’s Rule 9(b) RICO Case Statement also make

1 **1. *The Rise Fall & Rise of a Mayor***

2 Plaintiff's work *The Mayor* appears to recount fictional scenes from the life of
3 former Washington, D.C mayor Marion S. Barry, Jr. ("Barry"). The screenplay
4 opens with an infant Barry, his mother, and several other sharecroppers in a field in
5 Mississippi discussing the difficulties of life in the segregated South.⁷ ECF No. 90,
6 Ex. B at 11-13. The story moves to Memphis, Tennessee (but nothing else happens),
7 *id.* at 13-14, and then to a liquor store in Washington D.C., where characters discuss
8 how "white folks keep setting our leaders up," but acknowledge that Barry ultimately
9 "hurt himself." *Id.* at 14-15; *id.* at 18 (Barry "let his private parts get in the way").

10 The remainder of the screenplay consists of a series of disconnected scenes,
11 told in a combination of flashback and voiceover. The first involves Barry's efforts
12 to remove the racist "Congressman Chandler" from the Board of Trustees of
13 LeMoyne College. *Id.* at 26-28. The story skips back to Washington D.C., where
14 "Black Muslims" have entered a building with guns. *Id.* at 28. Barry, now a D.C.
15 City Councilman, is shot and taken to the hospital. *Id.* at 30. He goes on to become
16 mayor. *Id.* "Dr. King," presumably Dr. Martin Luther King, Jr., then gives a series
17 of short speeches. *Id.* at 41-43. The last speech occurs in April 1968 in Memphis.

18 _____
19 passing references to *This Is It*, see Compl., ¶ 26; ECF No. 7 ("Case Statement"), ¶
20 20, 25, but the claims in the Complaint do not appear to be based on *This Is It's*
21 purported infringement of *Ben*. Defendants thus do not address *This Is It*, but will, at
22 the Court's request, supplement their motion to address *This Is It* and *Ben*.

23 ⁷ Plaintiff did not attach copies of either of his Works to his Complaint and has
24 declined to provide them. Johnson Decl. ISO RJN, ¶ 6. Defendants therefore
25 ordered the deposit copies associated with the copyright registrations Plaintiff
26 attached to the Complaint. See *id.*, ¶ 7; ECF No. 6, Exs. 2 & 2B. The deposit copy
27 for *The Mayor*, however, was a work entitled "Marilyn Dances." See RJN Ex. E.
28 Plaintiff attached excerpts of what he appears to believe are the infringed portions of
the screenplay version of *The Mayor* (the version Plaintiff intends to assert in his
amended complaint) to one of his motions. See RJN, Ex. F; ECF No. 102
(explaining difference in versions); ECF No. 105 at 4, 11. Defendants refer to the
excerpts below, using the numbers on the bottom right-hand corner of each page.

1 *Id.* As the speech concludes, King is assassinated. *Id.* at 48 (“**We hear shots**”).

2 The story fast-forwards to Barry lecturing his wife about “the government’s”
3 efforts to imprison African-American men and cause them to become addicted to
4 crack cocaine. *Id.* at 58. The script then “cut[s] to” FBI headquarters, where two
5 FBI agents discuss how they “almost got [Barry] last month,” *Id.* at 60 and then back
6 to Barry who says that he has been “tried [and] convicted . . . by the City’s white-
7 controlled media.” *Id.* at 63. Barry is arrested by the FBI. *Id.* at 79. The screenplay
8 ends with Barry’s trial, and more voiceover. *Id.* at 144.

9 **2. Lee Daniels’ *The Butler***

10 The first of the alleged-infringing works, *The Butler*, follows the story of
11 African-American White House butler Cecil Gaines. *See* RJN, Ex. G. Gaines’s
12 story begins in 1926, in a field on a plantation in Macon, Georgia. *Id.* at 1:21.
13 Gaines is offered a position in the house and trained to be a server after the plantation
14 owner rapes his mother and kills his father. *Id.* at 4:30-50. Gaines leaves the
15 plantation in 1933, *id.* at 5:59-7:25, becomes a servant at a hotel, *id.* at 8:42-10:10,
16 and ultimately becomes a White House butler, *id.* at 16:54-19:08.

17 Throughout *The Butler*, Gaines observes, but declines to become involved in,
18 many of the important civil rights issues of the twentieth century, including for
19 example, President Eisenhower’s struggles with whether to send troops in to enforce
20 the recent *Brown v. Board of Education* decision, *id.* at 25:55-26:35, and President
21 Johnson’s announcement of the Voting Rights Act after watching news footage of
22 black demonstrators being clubbed by militia on the Edmund Pettus bridge. *Id.* at
23 1:13:46-1:14:27. In contrast to Gaines’ passive observations, his son Louis becomes
24 a political activist, *id.* at 52:03-54:29, an associate of Dr. King, *id.* at 1:15:10-
25 1:18:40, and, after becoming disillusioned with the non-violent civil rights
26 movement, a member of the Black Panther Party. *Id.* at 1:21:34-1:24:35. Gaines’s
27 wife Gloria struggles with Gaines’s work-related absences, becomes an alcoholic and
28 has an affair, but later reconciles with Gaines. *Id.* at 1:02:06-1:07:07.

1 Gaines’s apolitical stance ends when he observes President Ronald Reagan
2 vowing to veto any bill imposing sanctions on South Africa for its brutal treatment of
3 its black population. *Id.* at 1:47:48-1:49:05. After a period of soul-searching, Gaines
4 resigns his position as a butler and joins Louis at a protest. *Id.* at 1:50:18-1:56:18.
5 The movie concludes in 2008 with Gaines returning to the White House to visit
6 newly elected President Barak Obama. *Id.* at 2:03:05-2:04:30.

7 **3. *Selma***

8 The second allegedly infringing work, *Selma*, chronicles Dr. Martin Luther
9 King, Jr.’s efforts to secure voting rights for African-Americans in the south. RJN,
10 Ex. H. Early in the film Dr. King meets with President Johnson at the White House,
11 where he presses the President to pass legislation to protect African-Americans right
12 to vote. *Id.* at 8:50-13:20. Johnson refuses to focus on voting rights that year. *Id.*
13 Dr. King then decides to travel to Selma to organize demonstrations aimed at
14 securing voting rights. *Id.* at 13:25-30. In Selma, Dr. King leads a march to the
15 courthouse, where one demonstrator is assaulted County Sherriff Jim Clark. *Id.* at
16 34:31-36:16. Dr. King and the demonstrators are arrested. *Id.* at 36:17-30.

17 After a demonstrator is killed by state troopers at a second protest that Dr.
18 King does not attend, Dr. King meets again with President Johnson, telling Johnson
19 that he plans to organize a march from Selma to the state capital in Montgomery. *Id.*
20 at 58:25-1:00:42. When Dr. King leaves, Johnson orders his advisor, Lee White, to
21 contact FBI Director J. Edgar Hoover. *Id.* at 1:00:43-57.

22 In the next scene, Dr. King and Coretta listen to a tape, apparently sent by the
23 FBI, of an ominous voice calling King a fraud. *Id.* at 1:01:00-26. The tape ends with
24 sounds of two people having sex. *Id.* at 1:01:27-38. Dr. King denies that the man is
25 him. *Id.* at 1:01:40-52. Coretta agrees but asks Dr. King whether he has ever loved
26 “any of the others.” An ashamed Dr. King says “no.” *Id.* at 1:04:59-1:05:25.

27 The next day in Selma, more than 500 demonstrators, begin to march from
28 Selma to Montgomery. *Id.* at 1:10:38-1:17:50. As they arrive at the Edmund Pettus

1 Bridge, they are viciously attacked by state troopers. *Id.*

2 After returning to Selma, Dr. King decides to hold a second march. *Id.* at
3 1:19:30-49. Thousands of people, white and black, travel to Selma to attend the
4 march. *Id.* at 1:20:41-1:21:34. On the day of the march, the demonstrators are again
5 confronted by troopers on the bridge. *Id.* at 1:26:43-1:27:15. Although the troopers
6 back away, Dr. King, after praying, leads the demonstrators away from the bridge
7 because of his fear that the troopers may be laying a trap. *Id.* at 1:28:05-1:29:45.

8 Dr. King and his allies organize a third march after obtaining a court order
9 enjoining the state authorities from interfering. *Id.* at 1:44:47-1:45:55. At the same
10 time, President Johnson decides to embrace the voting rights issue and announces the
11 Voting Rights Act. *Id.* at 1:46:15-1:50:53. Dr. King is relieved. *Id.* at 1:50:53-
12 1:51:05 The film concludes with Dr. King leading the march and giving a powerful
13 speech on the steps of the Statehouse in Montgomery. *Id.* at 1:56:05-1:59:50.

14 **III. THIS COURT SHOULD GRANT DEFENDANTS' MOTION**

15 A party may move for judgment on the pleadings “[a]fter the pleadings are
16 closed.” Fed. R. Civ. P. 12(c). “Analysis under Rule 12(c) is ‘substantially
17 identical’ to analysis under Rule 12(b)(6).” *Chavez v. United States*, 683 F.3d 1102,
18 1108 (9th Cir. 2012). To survive a motion to dismiss under Federal Rule of Civil
19 Procedure 12(b)(6), a complaint “must contain sufficient factual matter, accepted as
20 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
21 U.S. 662, 678 (2009) (citation omitted). “[T]he tenet that a court must accept as true
22 all of the allegations contained in a complaint” does not apply to legal conclusions,
23 even where, as in this case, Plaintiffs are proceeding *pro se*. See *Newsom v.*
24 *Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1006 (N.D. Cal. 2010)
25 (quoting *Iqbal*, 556 U.S. 662, 678 (2009)).

26 When deciding a Rule 12(b)(6) motion, the Court may also consider evidence
27 on which the complaint “‘necessarily relies’ if: (1) the complaint refers to the
28 document; (2) the document is central to the plaintiff’s claim; and (3) no party

1 questions the authenticity of the document.” *United States v. Corinthian Colleges*,
2 655 F.3d 984, 999 (9th Cir. 2011) (citation omitted). Where, as here, the plaintiff’s
3 works and the allegedly infringing work “are referenced in—although not attached
4 to—the amended complaint, they are incorporated by reference in it, and can be
5 considered by the court in assessing substantial similarity.” *Shame on You Prods.,*
6 *Inc. v. Banks*, 120 F. Supp. 3d 1123, 1144 (C.D. Cal 2015); *see also, e.g., Campbell*
7 *v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 n.3 (N.D. Cal. 2010) (considering
8 screenplay and alleged infringing film).

9 **A. Plaintiff’s Complaint Should Be Dismissed in Light of Plaintiff’s**
10 **Violation of Numerous Vexatious Litigant Orders**

11 When a litigant “fil[es] in one district court to avoid a vexatious litigant order
12 in another, . . . a district court has authority to dismiss.” *In re Fillbach*, 223 F.3d
13 1089, 1091 (9th Cir. 2000); *see also Kersh v. Cook*, 332 F. App’x 420, 420-21 (9th
14 Cir. 2009) (dismissing claims). Numerous courts—including the United States
15 District Courts for the Western District of Louisiana, Eastern District of Virginia,
16 District of Columbia, and District of Maryland, and the Superior Court for the
17 District of Columbia—have already barred Plaintiff from filing suit without
18 obtaining leave of the relevant court. *See* RJN Ex. B (*White & Case*, ECF No. 45 at
19 1); *id.*, Ex. C (*Friedman*, ECF No. 48 at 1); *Paramount*, 2009 WL 1491402, at *4;
20 *Wickham*, 2005 WL 2874975, at *4; *Viacom*, 233 F. Supp. 2d at 727. Plaintiff
21 brought suit in this District in a transparent effort to circumvent the bars imposed by
22 these other courts. This Court should dismiss Plaintiff’s Complaint and reject any
23 effort by Plaintiff to re-plead his patently meritless claims.

24 **B. Each of Plaintiff’s Eighteen Causes of Action Should Be Dismissed**

25 Plaintiff’s Complaint should also be dismissed because Plaintiff fails to plead
26 facts sufficient to state any of his eighteen causes of action. As Plaintiff cannot state
27 any of his claims for relief unless he can show that his copyrights in *The Mayor* or
28 *Ben* was infringed, Defendants first address the fatal flaws in Plaintiff’s fifth cause of

1 action for copyright infringement.

2 **1. Plaintiff Fails to State a Claim for Copyright Infringement**

3 To state a claim for copyright infringement, “a plaintiff must show (1)
4 ownership of a valid copyright and (2) violation by the alleged infringer of at least
5 one of the exclusive rights granted to copyright owners by the Copyright Act.” *UMG*
6 *Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011); *see also* 17 U.S.C.
7 § 501(a). Absent direct evidence of copying, a plaintiff must demonstrate: (1) the
8 defendant had access to his works, and (2) that the two works are “substantially
9 similar.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

10 **(a) Plaintiff Fails to Allege Access**

11 A plaintiff may demonstrate access by alleging facts: “(1) establishing a chain
12 of events linking the plaintiff’s work and the defendant’s access, or (2) showing that
13 the plaintiff’s work has been widely disseminated.” *Art Attacks Ink, LLC v. MGA*
14 *Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). “To prove access, a plaintiff must
15 show a reasonable possibility, not merely a bare possibility,” that a defendant had the
16 chance to view the work. *Id.* (affirming dismissal of claim). Plaintiff does not allege
17 that *The Mayor* was “widely disseminated,” nor does he allege facts showing a
18 “chain of events” that would have resulted in his work being provided to Defendants.
19 Indeed, the only individuals or entities Plaintiff implies might have received a copy
20 of *The Mayor* are Charles Burnett, the director of the 1999 film *Selma Lord Selma*,
21 and Cedric Glover, the former mayor of Shreveport, LA. (Compl., ¶¶ 24, 37.⁸)
22 Plaintiff, however, offers no explanation as to how *The Mayor* could possibly have
23 made its way to Defendants. This Court may dismiss Plaintiff’s infringement claim
24 based on this failure alone. *See Feldman v. Twentieth Century Fox Film Corp.*, 723
25 F. Supp. 2d 357, 365-66 (D. Mass. 2010) (dismissing claim).

26 _____
27 ⁸ In Plaintiff’s claim for “Privacy Violations,” he alleges that unnamed “other
28 defendants . . . obtain[ed] his copyrighted” Works. (Compl., ¶ 113.) This conclusory
allegation fails because it is not supported by any facts. *See Iqbal*, 556 U.S. at 678.

(b) The Works Are Not Substantially Similar

This Court should also dismiss Plaintiff's infringement claim because Plaintiff's works are not substantially similar to either *The Butler* or *Selma*. See *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130-31 (C.D. Cal. 2007) (collecting cases). The substantial similarity test contains an extrinsic and intrinsic component. *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). At the pleading stage, only the extrinsic test applies. *Id.* The Court "must take care to inquire only whether 'the protectable elements, standing alone, are substantially similar.'" *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (citation omitted, emphasis in original). The extrinsic test "focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994) (citation and quotation marks omitted).

Applying each factor of the extrinsic test, it is clear that there is no substantial similarity between the protectable elements of *The Mayor* and *The Butler* or *Selma*.

(i) The Mayor Is Not Similar to The Butler

Plot and Sequence of Events. *The Mayor* depicts events in the life of former Washington D.C. Mayor Marion Barry, leading up to his fall from grace. RJN, Ex. F at 18. *The Mayor* does not unfold linearly, but jumps around in time, using voiceovers and flashbacks to describe the events. See *id.*, at 14, 18, 60, 64. *The Butler*, on the other hand, tells the story of former White House butler Cecil Gaines in mostly chronological order, as he leaves the rural south; becomes employed at the White House; interacts with a series of Presidents; observes significant events in U.S. history; and struggles to maintain his relationships with his family. See, e.g., RJN, Ex. G at 4:30-50, 5:59-7:25, 8:42-11:13, 16:54-19:08, 25:55-26:35, 28:19-53, 59:50-1:07:07. Unlike Barry, Gaines does not become a politician; shies away from any involvement in the civil rights movement for most of the film, see *id.* at 13:00-17,

1 28:19-53; and never had his career destroyed due to an extra-marital affair.

2 Although not in the Complaint, Plaintiff has, in a previous motion, identified
3 certain scenes he believes support a finding of substantial similarity. Plaintiff argues,
4 for example, that the works are similar because both include scenes in which young
5 versions of their protagonists appear in southern cotton fields and, in both scenes, a
6 character suggests that the protagonist be taken “inside the house.” ECF No. 90 at 8,
7 11. Scenes depicting the characters in a field “flow naturally from the works’ shared
8 unprotected premise” of southern African-American men in the early twentieth
9 century and are not protectable. *Benay v. Warner Bros. Ent.*, 607 F.3d 620, 627-28
10 (9th Cir. 2010). The scenes are also quite dissimilar: in *The Mayor*, Barry’s mother
11 holds an infant Barry while discussing the plight of southern blacks and is told to
12 take Barry inside because it is hot, RJN, Ex. F at 11, while in *The Butler*, Gaines
13 witnesses his mother’s rape and father’s murder and is invited to work in the owner’s
14 home as a meager consolation, *id.*, Ex. G at 1:28-4:40; *see Walker v. Time Life Films,*
15 *Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (no similarity based on scenes in which a person
16 is thrown off a roof because there were significant differences between the scenes).

17 Neither is there similarity in the fact that both protagonists move to D.C. ECF
18 No. 90 at 11. It was not uncommon for African-Americans to leave the south in
19 search of opportunity and to escape racism. *See Benay*, 607 F.3d at 627-28. More
20 important, the moves occur under different circumstances: the infant Barry moves to
21 Tennessee with his mother and an adult Barry is seen in D.C. with no explanation of
22 how he arrived, RJN, Ex. F at 12, while Gaines leaves Georgia as an adult to escape
23 violence, and his path to D.C. is shown in several scenes RJN, Ex. G at 6:00-12:30.⁹

24 **Characters.** Only characters that are “especially distinctive” are protectable.

25 _____
26 ⁹ That both *The Mayor* and *The Butler* contain scenes where a character does not
27 want to engage in sex because she is preoccupied with other matters (*see* ECF No. 90
28 at 8) is likewise not evidence of infringement, *see Cavalier*, 297 F.3d at 823
 (“[f]amiliar stock scenes and themes that are staples of literature are not protected”).

1 *Olson v. National Broad. Co., Inc.*, 855 F.2d 1446, 1452 (9th Cir. 1988). Plaintiff
2 alleges that *The Mayor* is similar to *The Butler* because Dr. King appears in both
3 works. Compl., ¶ 23. Historical facts, such as Dr. King’s existence and participation
4 in the civil rights movement, are not protectable. *See Benay*, 607 F.3d at 625.

5 Plaintiff also claims that Barry is similar to Gaines’ eldest son, Louis, because
6 Louis is a “radical politician” and so is the “young . . . Barry.” ECF No. 90 at 12.
7 The *facts* of young Barry’s political life are not protectable. *See Benay*, 607 F.3d at
8 625. Regardless, the characters are not at all similar: young Barry’s only “radical”
9 political activity is writing a letter to a congressman, *see* RJN, Ex. F at 25, while
10 Louis engages in sit-ins, rides the Freedom Bus, is regularly arrested, and joins the
11 Black Panthers, *see* RJN, Ex. G at 38:42-43:44, 52:03-54:29, 1:21:34-1:22:17.

12 Plaintiff’s argument that “[t]he Male and Female characters [on] page 18” of
13 *The Mayor* “resemble[] the character[s] Gloria Gaines . . . and Howard,” ECF No. 90
14 at 11, is also unavailing. Plaintiff appears to be referring to the fact that Sandy and
15 Leroy in *The Mayor* and Gloria and her lover Howard in *The Butler* have drinking
16 problems. The fact that a character is an alcoholic, however, is not protectable,
17 *Feldman*, 723 F. Supp. 2d at 367, and the characters do not share any other traits.¹⁰

18 **Mood.** Plaintiff’s work is sullen and brooding, and focuses on Barry’s
19 downfall and the perceived conspiracy against him. *See* RJN, Ex. F at 14, 18, 60, 64.
20 *The Butler*, on the other hand, generally proceeds on an upward trajectory, with
21 Gaines gaining a better sense of himself and improving his relationship with his
22 family members. *See, e.g.*, RJN, Ex. G at 1:05:31-1:07:05, 1:49:00-1:56:18.

23 **Pace.** Plaintiff’s script seems to move around haphazardly in terms of time,
24 location, and characters. *See* RJN, Ex. F at 12, 17, 18, 25-28. *The Butler* moves
25 mostly linearly, *see* RJN, Ex. G at 0:30-2:04:16, thus “impart[ing] a continuity . . .
26 entirely missing from” Plaintiff’s work. *Walker*, 784 F.2d at 49 (holding “intensely

27 ¹⁰ The myriad characters that appear in *The Butler* but not *The Mayor* also weighs
28 against a finding of substantially similar. *See Funky Films*, 462 F.3d at 1078-79.

1 **Characters.** The only alleged similarity in character between *The Mayor* and
2 *Selma* is Dr. King. Dr. King’s presence in a story about the civil rights movement
3 both concerns unprotectable historical facts, *see Benay*, 607 F.3d at 625, and flows
4 naturally from the premise of each work. *See Cavalier*, 297 F.3d at 823. Moreover,
5 Dr. King is depicted differently in each work: in *The Mayor* he is depicted primarily
6 as giving speeches, *see* RJN, Ex. F at 41-43, while in *Selma*, King is portrayed as a
7 nuanced character—a husband, father and leader, *see* RJN, Ex. H at 0:59-2:02:55.¹²

8 **Mood.** *Selma*, which shows King’s determination in the face of tremendous
9 obstacles and is ultimately triumphant in its mood, *see, e.g., id.* at 1:53:34-1:59:59,
10 bears no resemblance to Plaintiff’s sullen work, which focuses on Barry’s downfall.

11 **Pace.** Plaintiff’s script is disjointed and haphazard, and covers a large swath
12 of time, depicting Barry from an infant into adulthood. In contrast, *Selma* proceeds
13 linearly and only spans a short period of time in 1964 and 1965.

14 **Theme.** *The Mayor* focuses primarily on Barry’s downfall, while *Selma*
15 depicts the events leading up to the Selma to Montgomery march.

16 **Setting.** While at times the characters in each work appear in Washington,
17 D.C. and the American South, *Selma* takes place primarily in Selma, Alabama, while
18 the primary setting for *The Mayor* is Washington D.C.

19 **Dialogue.** Plaintiff claims that the song *Glory* at the end of *Selma*, *see* RJN,
20 Ex. H at 1:59:50, “was inspired by” a scene in *The Mayor* in which Dr. King
21 exclaims “Glory Hallelujah,” ECF No. 90 at 6-7. “Glory hallelujah” is a non-
22 protectable ordinary phrase. *See* 37 C.F.R. § 202.1. Moreover, the use of the word
23 “glory” naturally flows from the fact that *Glory* caps a movie whose protagonist, Dr.
24 King, is a preacher. RJN, Ex. H at 1:59:20; *see also Benay*, 607 F.3d at 628 (no

25 _____
26 RJN, Ex. H at 1:56:30 (closing with speech in Montgomery, Alabama in 1965). In
27 any event, the fact of the 1968 speech is not protectable. *See Benay*, 607 F.3d at 625.

28 ¹² The presence of characters in *Selma* that do not appear in *The Mayor* also weighs
against a finding of substantial similarity. *See Funky Films*, 462 F.3d at 1078-79.

1 similarity based on use of the term “gaijin” in works about military advisor in Japan).

2 **2. Plaintiff’s Remaining Claims Also Fail as a Matter of Law**

3 **(a) Plaintiff’s RICO Claims Fail**

4 Plaintiff’s first, second, and third causes of action allege violations of various
5 provisions of the Racketeer Influenced and Corrupt Organizations Act. *See* Compl.,
6 ¶¶ 46-63(alleging violation of 18 U.S.C. §§ 1962(b), (c), and (d)). To state a claim
7 under 1962(c), Plaintiff must allege: “(1) conduct (2) of an enterprise (3) through a
8 pattern (4) of racketeering activity (known as ‘predicate acts’) (5) causing injury to
9 plaintiff’s ‘business or property.’” *Living Designs, Inc. v. E.I. Dupont de Nemours &*
10 *Co.*, 431 F.3d 353, 361 (9th Cir. 2005). 1962(b) is similar, but requires Plaintiff to
11 allege that Defendants *acquired control* of an enterprise through their racketeering
12 activity. *See Jalili v. Far E. Nat. Bank*, No. C 12-5962 SBA, 2013 WL 1832648, at
13 *3 (N.D. Cal. May 1, 2013). Section 1962(d) prohibits conspiracies to violate
14 1962(b) or (c). Plaintiff’s allegations fail under 1962(b), (c), or (d).

15 *First*, Plaintiff fails to sufficiently allege racketeering activity. Plaintiff alleges
16 conclusorily that there were “predicate acts . . . cluster[ing] around criminal
17 copyright infringement[] [and] trafficking in certain goods bearing counterfeit
18 marks.” Compl., ¶ 44. As set forth *supra*, Plaintiff’s infringement allegations fail.
19 Moreover, while *criminal* infringement (which requires piracy or counterfeiting) is a
20 predicate act, “run-of-the-mill” infringement, like that alleged by Plaintiff, is not.
21 *Robert Kubicek Architects & Associates Inc. v. Bosley*, No. CV 11-2112 PHX DGC,
22 2012 WL 3149348, at *2 (D. Ariz. Aug. 1, 2012) (dismissing claims where “there
23 [was] no suggestion of piracy or counterfeiting”); *Stewart v. Wachowski*, No. CV 03-
24 2873 MMM VBKX, 2005 WL 6184235, at *5 (C.D. Cal. June 14, 2005) (same).¹³

25 _____
26 ¹³ While Plaintiff also alleges predicate acts such as “retaliation against [a] Federal
27 Witness” and “slavery,” Compl., ¶ 44, these allegations are insufficient as they
28 simply list acts found in 18 U.S.C. § 1961(b). *See Jalili*, 2013 WL 1832648, at *4
(RICO claim failed under *Iqbal* where allegations “simply restate[d] . . .the statute”).

1 *Second*, Plaintiff fails to allege facts showing that Defendants’ alleged
2 infringement of *The Butler* and *Selma* are “related” or that there is a “threat” that
3 Defendants will produce future films that infringe his Works as is required to
4 demonstrate a “pattern” of racketeering activity. *Jalili*, 2013 WL 1832648, at *4.

5 *Third*, Plaintiff fails to allege the existence of an enterprise. Although Plaintiff
6 alleges that Defendants were involved in “a RICO enterprise of individuals who were
7 associated in fact,” Compl., ¶ 47; *see also id.*, ¶¶ 53, 59, this unsupported allegation
8 will not suffice to demonstrate the existence of an “associated in fact” enterprise, *see*
9 *Jalili*, 2013 WL 1832648, at *6 (holding that a plaintiff alleging an associated in fact
10 enterprise must (1) demonstrate the existence of “an ongoing organization,” and (2)
11 show “that the various associates function as a continuing unit,” and dismissing
12 claim where enterprise allegations were “entirely conclusory”).

13 *Fourth*, Plaintiff fails to allege facts showing Defendants RICO conduct
14 injured his business or property.

15 *Finally*, Plaintiff’s claim fails under 1962(d) because Plaintiff has not alleged
16 facts showing that Defendants were part of *any* conspiracy, let alone a conspiracy to
17 violate 1962(b) or (c).

18 **(b) Plaintiff’s Fraud Claims Fail**

19 **(i) Plaintiff’s Fails to State a Claim for Fraud**

20 Plaintiff’s fourth and tenth causes of action for “fraud” similarly fail. Compl.,
21 ¶¶ 99, 111. Plaintiff’s single, conclusory allegation in support of his fourth cause of
22 action, that “defendant[s] engaged in fraud relating to the conspiracy to massively
23 infringe and steal [his] copyrighted works,” *see* Compl., ¶ 99, does not satisfy Rule
24 9(b), which requires fraud claims to be pled “with particularity.” Fed. R. Civ. Proc.
25 9(b); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
26 (“Averments of fraud must be accompanied by ‘the who, what, when, where, and
27 how’”). Plaintiff does not allege what false statements Paramount, SPE, or Viacom
28 made, or when, where, or how they were made. *See Vess v. Ciba-Geigy Corp. USA*,

1 317 F.3d 1097, 1107 (9th Cir. 2003) (dismissing claims where plaintiff failed to
2 “identify . . . misrepresentations or specify when and where they occurred”).

3 Plaintiff’s tenth cause of action is similarly deficient. Plaintiff alleges that
4 “Defendants engaged in . . [a] sheme (sic) involving members of the court to
5 massively steal the” Works. Compl., ¶ 111. Plaintiff incorporates his Case
6 Statement, which identifies various judges, lawyers, and other individuals who
7 plaintiff contends are related in some way, discusses the many rulings against him,
8 and concludes that they have resulted in “added theft” of his Works. *See, e.g.*, Case
9 Statement, ¶ 3, 7, 10, 12-19. Plaintiff does not identify a false statement, set forth the
10 circumstances under which it was made, or identify the responsible Defendants. *See*
11 *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (“a plaintiff must, at a
12 minimum, ‘identif[y] the role of [each] defendant[] in the’” fraud).

13 **(ii) Plaintiff’s Fraud Claims Are Preempted**

14 Plaintiff’s fraud claims are also preempted by the Copyright Act. *Sybersound*
15 *Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1150 (9th Cir. 2008) (citing 17 U.S.C.
16 § 301(a)). A claim is preempted if: (1) “the ‘subject matter’” falls within the scope
17 of copyright, and (2) the rights asserted “are equivalent to . . . the exclusive rights of
18 copyright holders.” *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th
19 Cir. 2006). The second part of the test focuses on whether the state law claim has
20 “an extra element.” *Id.* at 1143. Critically, however, to avoid preemption, the extra
21 element must “transform the nature of the action.” *Id.* at 1144.

22 Plaintiff’s fraud claims relate to Plaintiff’s copyrighted Works and therefore
23 fall within the subject matter of copyright. Compl., ¶¶ 99, 111. Moreover, although
24 fraud generally requires the extra element of misrepresentation, courts have held that
25 fraud claims are preempted where the plaintiff is alleging that a defendant has
26 “fraudulently engaged in acts that are reserved for copyright holders,” *e.g.*,
27 “improperly utilizing” a work. *E.g., Design Art, Inc.*, No. 00CV593 JM (JAH), 2000
28 WL 33151646, at *4 (S.D. Cal. Aug. 18, 2000). Plaintiff’s fraud claims allege, at

1 most, that Defendants infringed his Works, *see* Compl., ¶ 99 (“[e]ach defendant
2 engaged in fraud relating to the conspiracy to massively infringe . . . plaintiff’s
3 copyrighted works”); *id.*, ¶ 111 (“Defendants engaged in an elaborate scheme (sic) . . .
4 [to] steal the . . . copyrighted works”), and are therefore preempted. *See Design Art*,
5 2000 WL 33151646, at *4 ; *see also Giddings v. Vison House Prod., Inc.*, No. CV05-
6 2963-PHX-MHM, 2007 WL 2274800, at *3 (D. Ariz. Aug. 7, 2007).

7 **(c) Plaintiff’s Conspiracy Claim Fails**

8 The elements of a civil conspiracy are (1) a conspiracy, (2) wrongful conduct
9 in furtherance thereof, and (3) damages. *Mintel Learning Tech., Inc. v. Beijing Kaidi*
10 *Educ.*, No. C 06 7541 PJH, 2007 WL 2288329, at *4 (N.D. Cal. Aug. 9, 2007).
11 While Plaintiff claims that “Defendants conspired to both steal and infringe” his
12 Works, Compl., ¶ 104, he fails to allege any of the essential elements of his claim.¹⁴

13 **(d) Plaintiff’s Lanham Act Claim Fails**

14 Plaintiff’s seventh cause of action asserts that Defendants violated the Lanham
15 Act by failing to disclose that their films “are based on [his] copyrighted works.” *Id.*,
16 ¶ 107. Plaintiff’s claim is foreclosed by *Dastar Corp. v. Twentieth Century Fox Film*
17 *Corp.*, 539 U.S. 23 (2003), in which the Supreme Court held that the author of a
18 television show who alleged he did not receive credit had no remedy under the
19 Lanham Act. *Id.* at 37-38. The Court concluded that the phrase “false designation of
20 origin” in the Lanham Act refers to “the producer of the tangible goods” and not “to
21 the author of [an] idea [or] concept . . . embodied in those goods,” which is instead
22 protected under the Copyright Act. *Id.*; *see also Williams v. UMG Recordings, Inc.*,
23 281 F. Supp. 2d 1177, 1183 (C.D. Cal. 2003) (dismissing Lanham Act claim).

24
25 ¹⁴ While Plaintiff cites 42 U.S.C. § 1985(3) in support of his conspiracy claim, *see*
26 Compl., ¶ 104, he fails to allege any of the essential elements of a section 1985(3)
27 claim: (1) a conspiracy, (2) to deprive any person of the equal protection of the laws;
28 (3) an act in furtherance of the conspiracy; and (4) a resulting injury to a United
States citizen. *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980).

(e) Plaintiff's Racial Discrimination Claims Fail

Plaintiff's eighth cause of action alleges that SPE and several other entities breached implied contracts with Plaintiff based on his race. *See* Compl., ¶¶ 108-09. Plaintiff's thirteenth cause of action alleges that Defendants violated Plaintiff's civil rights based on "his race." *Id.*, ¶ 114 (citing 42 U.S.C. §§ 1981, 1983, 1991). Both claims fail. Plaintiff has not alleged any facts showing racial discrimination. He also has not pled facts showing the existence of an agreement, implied or otherwise, with Defendants. *See Schloss v. Sick Optic Elec., Inc.*, No. CIV. 96-20236 SW, 1996 WL 708374, at *2 (N.D. Cal. Nov. 22, 1996). Finally, he has not shown that Defendants' activities were attributable to the State. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (stating requirements for 1983 claim).

(f) Plaintiff's Negligence Claim Fails

Plaintiff's ninth cause of action alleges that "Defendants . . . were negligent relating to the fraud [and] copyright infringement . . . pertaining to" his "copyrighted works." Compl., ¶ 110. Plaintiff's claim fails because he has not pled facts showing Defendants owed him a duty, that they breached such duty, or that he was harmed. *See McIntyre v. Colonies-Pac., LLC*, 228 Cal. App. 4th 664, 671 (2014) (elements of negligence). Plaintiff's claim is also preempted to the extent the duty he relies upon is "a duty to protect [him] from . . . infringement." *Watermark Publishers v. High Tech. Sys. Inc.*, 1997 WL 717677, at *5 (S.D. Cal. Aug. 12, 1997) (claim preempted).

(g) Plaintiff's Tortious Interference Claim Fails

Plaintiff's eleventh cause of action purports to state a claim for malicious and tortious interference with Plaintiff's contracts. *See* Compl., ¶ 112. Plaintiff fails, however, to allege facts showing any of the essential elements, *i.e.* that (1) he had a valid contract with a third party; (2) Defendants knew about this contract; (3) Defendant acted intentionally to induce breach or disruption of the contract; (4) actual breach or disruption; and (5) resulting damage. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1133 (9th Cir. 2015).

(h) Plaintiff's Privacy Violation Claim Fails

In his twelfth cause of action, Plaintiff alleges that Defendants "violated [his] privacy, by obtaining his copyrighted" Works. Compl., ¶ 113. This claim fails. Plaintiff has not shown Defendants obtained his Works. The claim is also preempted because it is based on the alleged use of his Works in violation of his "exclusive [copyright] right[s]." *Laws*, 448 F.3d at 1144 (right of publicity claim preempted).

(i) Plaintiff's Unfair Competition Claims Fail

Plaintiff's fourteenth cause of action alleges a claim for unfair competition based on Defendants' unlawful "use[]" his Works. Compl., ¶ 115. Plaintiff's fifteenth cause of action similarly alleges unfair competition and "Copyright Infringement Under California Law." *Id.*, ¶ 117. These claims are preempted as they seek to protect rights that are not "qualitatively different from the copyright rights." *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (unfair competition claim preempted), overruled on other grounds by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) ; *see also Mention v. Gessell*, 714 F.2d 87, 90 (9th Cir. 1983) (common law copyright claims preempted).

Plaintiff's unfair competition claims also fail on the merits. California's Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200, prohibits unlawful, unfair, and fraudulent business acts. *Id.* Plaintiff's claim fails under the "unlawful" prong because Plaintiff has not alleged facts demonstrating that Defendants violated the Copyright Act or any other law. Plaintiff's claim fails under the "unfair" prong because Plaintiff has not shown that Defendants engaged in "conduct that threatens . . . [a] violation of an antitrust law." *Sybersound*, 517 F.3d at 1152. Finally, Plaintiff's claims fail under the fraud prong because he has not pled facts showing that Defendants made any "misrepresentations [that were] likely to deceive members of the . . . public." *Id.* at 1153 (affirming dismissal of UCL claim).

(j) Plaintiff's Conversion Claim Fails

Plaintiff's sixteenth cause of action for conversion fails because he has not

1 alleged facts showing that Defendants “us[ed]” his Works without permission, i.e.
2 converted them. Compl., ¶ 118. This claim is further preempted because “the
3 crucial allegation” is that “Defendants have wrongfully used . . . [his] work.” *Dielsi*
4 *v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996) (conversion claim preempted).

5 **(k) Plaintiff’s Vicarious Infringement Claim Fails**

6 Plaintiff’s seventeenth cause of action for vicarious infringement fails because
7 he has failed to “demonstrate direct infringement” as is required to state such a claim.
8 *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 937 (9th Cir. 2010).

9 **(l) Plaintiff’s Damages Claim Fails**

10 Finally, because all of Plaintiff’s substantive cause of actions fail, Plaintiff’s
11 eighteenth cause of action, which simply seeks “damages” fails. Compl., ¶ 120.

12 **IV. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE**

13 The gravamen of Plaintiff’s claims is that Defendants infringed *The Mayor*,
14 but neither *The Butler* nor *Selma* are substantially similar to *The Mayor*. Because
15 this basic deficiency “could not possibly be cured by [additional] allegation[s]” leave
16 to amend should be denied. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942
17 (9th Cir. 2009); *see also e.g., Campbell*, 718 F. Supp. 2d at 1116 (denying leave to
18 amend where the works not substantially similar); *Gadh v. Spiegel*, No. CV 14-855-
19 JFW PJWX, 2014 WL 1778950, at *6 (C.D. Cal. Apr. 2, 2014) (same).

20 **V. CONCLUSION**

21 For all the reasons set forth above, Defendants respectfully request that their
22 Motion for Judgment on the Pleadings be granted and this action be dismissed.

23 DATED: March 30, 2016

CALDWELL LESLIE & PROCTOR, PC

By /s/ Linda M. Burrow

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